



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**November 15, 2016 Government Records Council Meeting**

Richard B. Henry, Esq.  
(o/b/o Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council ("Council") considered the August 23, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the Custodian certify that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.
2. Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.
3. The GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and calculate reasonable attorney's fees as might be appropriate.



Interim Order Rendered by the  
Government Records Council  
On The 15<sup>th</sup> Day of November, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 16, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 15, 2016 Council Meeting**

**Richard B. Henry, Esq. (On Behalf of Joseph Cordaro)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-155**

**v.**

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 4, 2015 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger

**Request Received by Custodian:** March 6, 2015

**Response Made by Custodian:** March 11, 2015

**GRC Complaint Received:** June 1, 2015

**Background<sup>3</sup>**

**May 24, 2016 Council Meeting:**

At its May 24, 2016 meeting, the Government Records Council (“Council”) considered the May 17, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. The Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director

the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).

2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian's characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).
3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).
4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director, or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On May 26, 2016, the Custodian received the Council's Interim Order. On the same day, the Custodian's Counsel wrote to the GRC, advising that "sometime in February 2016 . . . all of the requested government records [were] provided to the attorney for Mr. Cordero's estate." However, Custodian's Counsel's response to the GRC was not in affidavit format. Following the GRC's subsequent outreach, Custodian's Counsel provided his response in affidavit format on June 24, 2016.

## Analysis

### Compliance

At its May 24, 2016 meeting, the Council ordered the Custodian either: (1) to disclose records to the Complainant or (2) to provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request and (3) to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 26, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 3, 2016.

On May 26, 2016, the same business day after receipt of the Council's Order, the Custodian's Counsel wrote to the GRC, advising that "sometime in February 2016 . . . all of the requested government records [were] provided to the attorney for Mr. Cordero's estate." However, Custodian's Counsel's response to the GRC was not in affidavit format, as was explicitly required by the Interim Order. On June 24, 2016, fifteen (15) business days after the deadline for compliance, Custodian's Counsel provided his response in affidavit format. Custodian's Counsel certified to his personal knowledge that all records responsive to Item No. 1 and Item Nos. 10-25, as identified in the Order, were previously provided to the attorney for the Estate of Joseph Cordaro. Custodian's Counsel further asserted that "there is no further need for compliance with the Order."<sup>4</sup>

In the instant matter, the Custodian did not provide the GRC a certification within the required time frame, as required by the Interim Order. In addition, neither the Custodian nor Custodian's Counsel requested from the GRC an extension of time to comply with the Interim Order. Instead, the Custodian's counsel merely provided an uncertified letter to the GRC on May 26, 2016, stating that he gave the responsive records, specifically Item No. 1 and Item Nos. 10-25, to Kathleen Beers, Esq., the attorney for the Estate of Joseph Cordaro. Moreover, Custodian's Counsel's certification did not establish that the Custodian disclosed records to the Complainant. Nor did the certification state that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

Therefore, the Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the certification prove that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

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<sup>4</sup> On June 24, 2016, the Complainant responded to the Custodian's Counsel's certification, contending that the Custodian failed to comply with the Council's Interim Order.  
Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director

## **Unlawful Denial of Access**

The Appellate Division has held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, (App. Div. 2008). The Appellate Division noted that “requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry.” Bart, 403 N.J. Super., at 618 (citations omitted). The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Court stated it was “undisputed that Bart at all times had within his possession a copy of [the requested record] . . . Indeed, he attached a copy to the compliant he filed with the Council.” Id. (emphasis supplied).

Similarly, the GRC has held that when a Complainant admits that he was in possession of the requested record at the time he made the request, it is not a denial of access if the Custodian failed to provide another copy. Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014). *See also* Owoh (on behalf of O.R.) v. West-Windsor Reg’l Sch. Dist. (Mercer), GRC 2012-330 (February 2013). In addition, “[a]ny limitations on the right of access accorded by [OPRA] as amended and supplemented shall be construed in favor of the public’s right of access[.]” Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

In response to the GRC’s May 24, 2015 Interim Order, the Counsel for the Custodian stated that he provided the “estate of Joseph Cordero” with the responsive records “sometime in February 2016.” The Custodian has not provided adequate proof, per the Interim Order, that the records were disclosed to the Complainant. Moreover, the Custodian did not establish that he disclosed records to the Complainant. Nor did his certification state that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Finally, the Complainant has not admitted that he is in possession of the responsive records.

Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.

## **Contested Facts**

The Administrative Procedures Act provides that the OAL “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when contested facts have arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See* Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In the matter currently before the Council, both the Custodian's failure to comply with the Council's Interim Order and the incomplete evidence of record create contested facts in the instant complaint. The GRC does not have enough information in the record to determine whether or not the Custodian lawfully denied access to the requested records. It is thus apparent that a fact-finding hearing will provide the most efficient and effective method for developing the record. *See also Gordon v. City of Orange (Essex)*, GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014).

Accordingly, the GRC should refer the complaint to the OAL for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and, if so, calculate reasonable attorney's fees as might be appropriate.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the Custodian certify that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.
2. Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.
3. The GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and calculate reasonable attorney's fees as might be appropriate.

Prepared By: Husna Kazmir  
Staff Attorney

August 23, 2016<sup>5</sup>

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<sup>5</sup> This complaint was prepared for adjudication at the Council's August 30, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum. Additionally, this complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the complaint was tabled based on legal advice.

Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director



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**INTERIM ORDER**

**May 24, 2016 Government Records Council Meeting**

Richard B. Henry, Esq. (o/b/o Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council ("Council") considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian denied the Complainant's request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian's initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).
2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian's characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).
3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose





the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director,<sup>2</sup> or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of May, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 26, 2016**

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<sup>1</sup> I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 24, 2016 Council Meeting**

**Richard B. Henry, Esq. (On Behalf of Joseph Cordaro)<sup>1</sup>  
Complainant**

**GRC Complaint No.2015-155**

**v.**

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 4, 2015 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger

**Request Received by Custodian:** March 6, 2015

**Response Made by Custodian:** March 11, 2015

**GRC Complaint Received:** June 1, 2015

**Background<sup>3</sup>**

**Request and Response:**

On March 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian,<sup>4</sup> seeking the above-mentioned records. On March 11, 2015, the Custodian responded in writing, denying the request on the basis that the documents requested constituted exempt criminal investigatory records.

**Denial of Access Complaint:**

On June 1, 2015<sup>5</sup>, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records should not

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<sup>1</sup> Joseph Cordaro, represented by Richard B. Henry, Esq. (Honesdale, PA).

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> The Custodian’s response stated that he had received the OPRA request on March 6, 2015, but he subsequently certified in his Statement of Information that he had received the OPRA request on March 2, 2016. In either event, the Custodian’s response was timely.

<sup>5</sup> The Complainant signed his Denial of Access Complaint on May 5, 2015, but the GRC did not receive it until June 1, 2015.

Richard N. Henry, Esq., O.B.O Joseph Cordaro v. Township of Hamilton Police Department (Atlantic), 2015-155 – Findings and Recommendations of the Executive Director

be considered exempt because the Atlantic County Prosecutor advised the Custodian on April 14, 2015 that “a homicide investigation should not be opened at this time.” The Complainant further argued that he understood that there was no ongoing investigation and therefore no reason why his request should be refused.

#### Statement of Information:

On July 2, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 6, 2015. The Custodian certified that he responded in writing on March 11, 2015, and denied access to the requested documents, stating that they constituted exempt criminal investigatory records. *Citing Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Crim. Justice*, GRC Complaint No. 2002-79 and 80. In Item 9 of his SOI, the Custodian described four records that he withheld, claiming that three of them were exempt as criminal investigatory records and that the other was a record already in the Complainant’s possession. He also described another twenty-five (25) records he withheld. The Custodian certified that some of those records could not be disclosed to the Complainant, as the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) requires the estate of Justin Cordaro to sign a form releasing the documents. Others, he argued, were documents given to the Custodian’s Office by the Complainant; therefore, the Custodian did not have to provide records already in the Complainant’s possession.

#### Additional Submissions:

On December 15, 2015, the GRC sought additional information from the Custodian. The GRC asked the Custodian to clarify which items were withheld from the requestor because of the Custodian’s claim that a signed HIPAA medical release must first be obtained. On December 22, 2015, the Custodian wrote to the GRC, stating his reasonable belief that items 2 through 9 in his Document Index, Section 2, were all records that could only be released if accompanied by a proper HIPAA form. The Custodian did not specifically address the reason for withholding the other seventeen (17) items.

### **Analysis**

#### **Insufficient Response**

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must definitively state that records did not exist at the time of the initial response.

As stated in DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009), GRC decisions have repeatedly supported the statutory mandate of N.J.S.A. 47:1A-5(g) as requiring that a custodian must “provide a legally valid reason” for any denial of access. To comply with OPRA, the denial “must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA.” DeAppolonio, *citing Morris v. Trenton Police Dep’t*, GRC Complaint No. 2007-160 (May 2008).

In Morris, the complainant requested several records. Without further elaboration, the custodian, denied access to the requested records. The Council, in finding that the custodian violated OPRA, stated “the Custodian’s failure to supply the requestor with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g).” Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian’s written response was insufficient, noted that, “if a custodian is ‘unable to comply with a request for access, then the custodian shall indicate the specific basis’ for noncompliance.” N.J.S.A. 47:1A-5(g).

In the present case, the Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio, 2008-62.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the GRC examined the status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1. There, the complainant sought access to copies of records related to alleged criminal actions committed by her son, who was allegedly killed by police officers. The Council found that under OPRA, criminal investigatory records “include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed” and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant’s request was denied, and the Council found no violation by the Custodian, stating: “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.” *Id.*

Further, in Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested all reports regarding an arrest and incident report of Hwang and a codefendant. The complainant also requested all police logs for the day of the arrest. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35-cents copy fee; however, he refused to disclose the “narrative” police logs, as they pertained to an open and ongoing criminal

investigation. The complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records. The complainant asserted that the case resulted in his arrest and has since been closed.

Relying on the holding in Janeczko, the GRC stated that:

[I]n the instant matter the Custodian has certified that Item No. 1 of the Complainant's request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. [citations omitted].

Id.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9(a).

In accordance with HIPAA, the New Jersey Administrative Code's provisions regarding the State Health Benefits Program state in part that:

“records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” (Emphasis added.) N.J.A.C. 17:9-1.2.

HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information “protected health information (PHI).” *See also Schilling v. Twp. of Little Egg Harbor (Ocean)*, GRC Complaint No. 2011-294 (February 2013) and Beaver v. Twp. of Middletown, GRC Complaint No. 2005-243 (August 2006).

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant, who attached to his Denial of Access Complaint a copy of the record allegedly denied, could not have been denied access to a requested record if he already had it in his possession. The purposes of OPRA, it stated, are not advanced by requiring a custodian to duplicate another copy of the requested record and send it to the complainant.

Here, the Custodian advances three different reasons for denying the records. Some, he says, are criminal investigatory records and therefore exempt from release. Others, he claims,

cannot be released because the estate of Justin Cordaro would first have to sign a HIPPA release form. Still other records should not be released to the Complainant because the Complainant has those documents already in his possession.

*Documents which are Criminal Investigatory Records in nature:*

In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian's characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko, GRC 2002-79 and 80; Hwang, GRC 2011-348.<sup>6</sup>

*Documents requiring HIPPA form release and other documents which the Complainant may already have in his possession:*

In Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013), the custodian initially denied access to the requested court orders, complaints, and settlement agreements and directed the complainant to the Superior Court. However, in the SOI, the custodian certified that outside counsel maintained responsive records and that the City would incur additional time and legal fees to obtain, review, and disclose same. The custodian argued that the City attempted to accommodate the request by directing the complainant to the Court. However, the Council held that:

The Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff, *supra*. Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.

Id.

In his SOI, the Custodian certified to, identified, and listed an additional twenty-five (25) records, some of which were documents he had received from the requestor and therefore were already "in [the Complainant's] possession." The Custodian stated that some others were medical records that the Custodian could not release absent a duly authorized HIPPA release form. He added that those records were available to the Complainant "from other sources."<sup>7</sup> To clarify which items were withheld for a specific reason or reasons, the GRC requested the

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<sup>6</sup> In the SOI, the Custodian identified a fourth document as already having been supplied to the Complainant. There is nothing of record refuting that part of the Custodian's certification. Accordingly, that item was also lawfully denied. Bart, 403 N.J. Super. 609.

<sup>7</sup> A custodian may not deny access simply because the requestor could obtain the records from other and perhaps more convenient sources. See Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

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Custodian to answer in a “precise” manner which items he had withheld for what reason and to explain whether multiple reasons might apply. Although the Custodian answered the request by stating he reasonably believed items 2-9 were such records that could require a signed HIPPA form before they are released, he did not address the remaining seventeen (17) items.

While a few of those remaining seventeen (17) items might arguably be in the possession of the Complainant, such as the birth certificate of Justin Cordaro and an email from Joseph Cordaro to a Detective, it remains unclear, despite the GRC’s efforts to clarify any uncertainty, which of the remaining records were withheld because they are already in the Complainant’s possession.

Accordingly, the Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013). Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).
2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian’s characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered

differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).

3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).
4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director,<sup>9</sup> or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Ernest Bongiovanni  
Staff Attorney

May 17, 2016

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<sup>8</sup> I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.